Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

BECKWITH PLACE L.P. and
SUSAN E. GLATTER KAMMAN,

Petitioners,

v.

GENERAL ELECTRIC CO., a New York corporation;
CHURCHILL VILLAGE, LLC,
BARBARA AND AL DORSETT,
SEYMOUR LAZAR, JOAN CHALMERS
and JUDITH SAPORTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federal court presented with a proposed settlement of a class action in which the original and settlement vehicle complaints both facially demonstrate that no viable federal claim exists must dismiss the claims rather than proceed to review and approve the settlement over the objections of state court litigants, some of whom have been certified in state court for the same claims.

Whether the standard for determining federal jurisdiction should be the Seventh and Eighth Circuit standard, directing dismissal where the alleged federal claim appears to be either immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous, or the Ninth Circuit standard that dismissal is compelled only where the federal claims "are so untenable in light of the plain language of the statute as to prohibit federal jurisdiction".

Whether a federal court presented with a proposed class action settlement must first determine the existence vel non of federal jurisdiction before proceeding to evaluate the fairness of the settlement; thus,

Whether the district court erred in approving a class action settlement in a case whose initial complaint presented a facially deficient assertion of diversity jurisdiction, supplanted with an equally deficient federal civil RICO claim, as a vehicle for the settlement, over the objections of state court litigants, some of whom had already obtained class certification in the state courts.

RULE 14.1(b) LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners: Beckwith Place L.P., and Susan E. Glatter-Kamman, Objectors below.

Respondents:

Plaintiffs Below: Churchill Village, LLC, Barbara and Al Dorsett, Seymour Lazar, Joan Chalmers, Judith Saporta

Defendant Below: General Electric Co.

Other parties below:

Other Intervenors/objectors below: Joseph Cooper, Nina Kasprzak, Harriet Skurman, Norman Hickman, Phyllis Hickman, Craig Rosenfield.

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II. The Ninth Circuit's standard — "cannot say the claims are *so* untenable in light of their conformity to the plain language of the statute to prohibit federal jurisdiction" — conflicts with the general level of scrutiny for subject matter jurisdiction, and the standards applied in the Seventh and Eighth Circuits, which direct dismissal where, as here, the federal claim is either: (a) immaterial and made solely for the purpose of obtaining jurisdiction; or (b) is wholly insubstantial and frivolous. 17

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Appendix B — Final Judgment And Order Of Dismissal With Prejudice Of The United States District Court For The Northern District Of California Filed January 22, 2002 ..... 30a

Beckwith Place LP and Susan E. Glatter-Kamman, for themselves and for the class of owners of relevant GE-manufactured dishwashers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is published as *Churchill Village LLC v. General Electric*, 361 F.3d 399 (9th Cir. 2004). (App. A) The district court's order approving the settlement before it is unreported. (App. B).

STATEMENT OF JURISDICTION

The decision sought to be reviewed was entered March 16, 2004 by the United States Court of Appeals for the Ninth Circuit. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States; . . . .

18 U.S.C. § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court. . . .

18 U.S.C. § 1962:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, . . . any part of such income, or the proceeds of such income, in acquisition of any interest in . . . any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

STATEMENT OF THE CASE

The petition presents the issue of whether federal subject matter jurisdiction existed to support the federal district court's approval of a settlement of a consumer class action over the objection of the named plaintiffs and representatives of a class of consumer litigants in state courts.

A. Background to the litigation. The Recall

Over the period 1983-1989, GE manufactured and sold some 3 million dishwashers that had an "energy-saver" slide switch[1] which presents a fire hazard. Over the years, the switch deteriorates, causing it to heat up, melt, and in some cases, ignite, causing a number of fires. For a number of years prior to the end of 1999, the Consumer Product Safety Commission and GE fought about the potential danger privately, without consumers knowing of the problem.

In October, 1999, GE announced a "recall" of the affected models of GE and Hotpoint dishwashers. Unlike most consumer product recalls, GE's 1999 dishwasher "recall" did not offer to take back or fix the items. Rather, GE advised consumers that the hazard could *not* be corrected, instructed consumers to just stop using the recalled dishwashers immediately, and offered consumers rebates on the purchase of certain new GE-brand dishwashers and a much lower rebate toward the purchase of any new Hotpoint or non-GE dishwasher.

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1. In general terms, an energy saver switch enables the consumer to choose whether to have the dishes dried by a powered heat cycle, or just to drip dry inside the machine.

Advising consumers that repair was not possible, GE notified consumers that their only option was to stop using the existing dishwashers and to purchase a new dishwasher. Neither the recall notice, the press release, GE's web site, the 800 telephone number, or statements by GE representatives to the media informed the public that repair was an alternative to purchasing a new dishwasher. Prior to December 14, 2000, instead of providing information on the ease of repair or its inexpensive cost, GE repeatedly stated that repair was not an option.

Indeed, GE discouraged repair of the recalled dishwashers by offering to the public a variety of reasons why repair was not an option.[2] GE's information about repair

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2. For example, in addition to implying on its web site that the recalled dishwashers were too old to be repaired, Kim Freeman, listed as the GE contact person on the recall announcements, was quoted in the Washington Post, dated October 19, 1999, as stating that: "The parts are not made anymore, so repairing it was not an option." Freeman also stated that the dishwashers were "beyond their useful life." *Id.*

In fact, GE even created a form letter that was sent to consumers who inquired about the recall and the possibility of repair. The identical form letter was sent by various GE Program Managers, including Richard D. Miller, Kim Spaulding, Betty Netherton, Linda Patterson, Tim Coyle and Kelly Redmon. GE mailed out some form letters unsigned but purportedly sent by a "Program Manager" as indicated by a typewritten signature line. The letter stated, in part:

> Unfortunately, repairing the unit is not an option that is available. The repair of the identified part, the energy-saver switch, would require that the entire door be reassembled and the parts are no longer available.

of the recalled dishwashers was disseminated throughout the country in newspaper articles and on the Internet. For example, the October 23, 1999 Minneapolis Star Tribune reported that: "Consumers should not try to repair the dishwasher but should get it replaced." In the October 25, 1999 Home Furnishing Network weekly, it stated that: "GE is not repairing recalled machines because the switches are no longer made and because of the dishwashers' age." The October 26, 1999 USA Today, reported that GE stated that "it did not have a repair for the faulty energy-saver switch that could cause the fire." In the October 28, 1999 Tulsa World, it stated: "No repairs. GE is not permitting replacement of the switches . . . GE has stopped selling the switch to repair firms."

B. Repair Was Actually Easy and Inexpensive

In fact, repair of the recalled dishwashers was not only possible, but could be accomplished easily and inexpensively[3]. This information was not provided to the public at large by GE prior to December 14, 2000, but was actively concealed from the public as GE discouraged repair and encouraged the purchase of a new GE dishwasher.

C. Lawsuits Filed Shortly thereafter, consumers filed lawsuits in various fora

The California litigation. On November 24, 1999, this lawsuit was filed in the San Francisco federal court, for Churchill Village, LLC, an Oregon company, owner of a Eugene, Oregon apartment building which contained

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3. Although the dishwashers could not be "fixed" to operate in the original manner, the fire danger could be eliminated by permanently wiring the switch for either regular powered dry or drip dry.

one or more dishwashers affected by the recall, asserting that the recall/rebate program inadequately compensated consumers. (Citations for these materials in the case below are to Appellant's Excerpts of the Record before the Ninth Circuit, Tab 1 (hereinafter "App. Ex. ___" or "App. Ex. __, pg. __".) The complaint claimed diversity jurisdiction, asserting that the injunctive relief sought by the plaintiff would, when measured from the defendant's perspective, exceed $75,000.[4]

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4. On December 23, 1999, Churchill's lawyer filed a First Amended Complaint, adding Barbara and Al Dorsett, a California couple who purchased and still owned one of the dishwashers; still resting their claims to federal jurisdiction on diversity, basing the amount in controversy on a defendant-view analysis of the value of injunctive relief sought.

The settling plaintiffs never disputed the lack of diversity jurisdiction, because the amount in dispute for any plaintiff, regardless of how viewed, could never reach the $75,000 jurisdictional amount. Aggregation of the claims have long been prohibited. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). And the Ninth Circuit had directly ruled that where the amount in dispute is small, there is simply no way such a consumer case can state a diversity claim to support federal jurisdiction. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 959 (9th Cir. 2001) and *Kanter v. Warner-Lambert Co.*, 265 F.3d 853 (9th Cir. 2001).

Indeed, the plaintiffs in these cases would not be able to raise the issue which actually has produced some debate, (i.e., whether the 1990 amendments to the Supplemental Jurisdiction provisions 28 U.S.C. § 1367 overrule *Zahn*, and permit the exercise of federal jurisdiction over all class members as long as one of them presents a federally justiciable claim) because NO plaintiff in these disputes has a sufficient claim to reach the jurisdictional amount. *See Ortega v. Star-Kist Foods, Inc.*, __ F.3d __, 2004 U.S. App. LEXIS 10714 (1st Cir. June 2, 2004) which lays out the debate among the circuits quite well.

The Illinois litigation. On December 3, 1999, Beckwith Place Limited Partnership, a Michigan property owner of some 200 units, sued GE in a state court action in the Illinois Circuit Court of Cook County, also seeking to represent consumers nationwide with respect to the dishwashers and the recall. On January 21, 2000, GE removed the case to federal court (N.D. Ill. No. 00 cv 416), asserting defendant-view diversity, but the district court (per Zagel, D.J.) disagreed, and on April 18, 2000, granted plaintiffs' motion and remanded the case back to Cook County Circuit Court. (April 18, 2000 Order, per Zagel, D.J)[5] App. Ex. 7b. The case proceeded on plaintiffs' motion for class certification and general discovery. The class representative's managing agent was deposed on November 27, 2000.

The Connecticut litigation. Consumers also sued in Connecticut. (The Skurman action). *Skurman v. General Electric Co.*, No. X05-CV000180900 (Conn. Supr. Stamford J.D.) was filed on March 1, 2000, followed by *Rosenfeld v. General Electric Co.*, (CV 00-0372594 S), filed in the same court on March 7, 2000. Both actions were brought as class actions on behalf of all owners of recalled dishwashers other than those who received information about repair prior to December 14, 2002, including all persons who purchased new dishwashers without receiving information about repair. Subsequent to their filing, the case was transferred to the Connecticut Complex Litigation Docket where the court ordered: (1) that the *Skurman* and *Rosenfeld* cases not be consolidated; and (2) that all proceedings occur in the *Skurman* action. On January 31, 2001, a Second Amended Class Action Complaint was filed, *inter alia*, adding claims and plaintiffs Norman and Phyllis Hickman (hereinafter the

5. Thus, GE may well have been collaterally estopped from claiming federal jurisdiction in the federal court in California.

Hickmans, Skurman and Rosenfeld are collectively referred to as "Appellants" or "*Skurman* Appellants").

On June 14, 2001, the *Skurman* Appellants filed a motion for class certification. GE refused to provide Appellants or the Connecticut court with a briefing schedule for the class certification motion. As such, Appellants filed a Request for Adjudication. On July 18, 2001, *Skurman* Appellants moved for summary judgment, as to liability, based on the decisions of the New York Court (discussed *infra*), and submitted a Request for Adjudication. GE never opposed the motion and sought to delay its consideration because of the settlement reached by the Settling parties and approved by the District Court.

Florida litigation. A Florida action was also commenced in federal court, asserting Civil RICO claims against GE. However this case was dismissed quickly for inability to state a RICO claim, and possibly refiled in State court.

The New York Attorney General litigation. On or about March 3, 2000, the New York State Attorney General filed a petition for New York residents against GE, challenging the recall as deceptive because, despite defendant's prior representations, the dishwashers could in fact be repaired easily and inexpensively. The New York Attorney General alleged that GE consistently misled consumers about the feasibility of repairing or reworking the dishwashers regarding the abatement of the fire hazard.

The actions all proceeded ahead separately from each other, in their various courts. In the California *Churchill Village/Dorsett* action, the plaintiffs sought and failed to obtain a preliminary injunction. May 10, 2000 Order, of

Patel, D.J. Discovery proceeded in most of the cases. GE moved for summary judgment in California federal court, and briefing proceeded on GE's efforts to dismiss that case.

D. The "Second Recall"

On December 14, 2000, GE acknowledged that the recalled dishwashers *could* be repaired and stated that it would supplement the October, 1999 recall by offering free repairs performed by GE technicians. GE agreed to have GE authorized technicians perform the repair in the form of a rewiring as an additional feature of the October, 1999 recall.[6]

E. The New York Court orders full restitution

On January 16, 2001, the New York Court found that GE's recall program was deceptive, specifically criticizing the directive that consumers had no choice but to replace their existing dishwashers, and ordered restitution for all New York residents who purchased new dishwashers pursuant to GE's recall and who would not have made such purchases if not for GE's statements about the unavailability of repair of the dishwashers.[7] Each such person will receive as restitution

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6. Essentially, GE's first "recall" had encouraged thousands of consumers to dispose of a costly, functioning household appliance. In contrast, GE had advised commercial owners that the hazardous switch could be rendered non-flammable, by a service technician's performing a simple, ten minute repair or rework procedure, which were in fact performed for large commercial customers; albeit, at less than such service usually cost the owner.

7. New York consumers are obtaining virtually the entire purchase price of their new dishwasher. In many cases, even after GE's rebate is deducted, New York consumers will receive several

(Cont'd)

the purchase price of the dishwasher, plus sales tax, less any amounts received for disposal of the existing dishwasher and less any rebate check received from GE.

As the New York Court stated, GE's comments about the age of the dishwashers "falsely implie[d] that a repair

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(Cont'd)
hundred dollars. Indeed, the cost of a new dishwasher has been estimated to be between $229.00 to $600.00. Thus, a person purchasing a $600.00 dishwasher, even after receiving the highest rebate from GE of $125.00, will still be able to receive $475.00 pursuant to the ruling of the New York Court.

On March 27, 2002, the New York Court affirmed the restitution formula, stating:

> Customers who purchased new dishwashers, only because they were falsely persuaded that their old, and unsafe dishwashers could not be repaired, and now who will recoup a portion of the expense that they incurred in purchasing those dishwashers, will not receive a windfall. Those consumers were induced to sell their old dishwashers . . . Where, as here, there is an inherent margin of uncertainty as to the precise measure of restitution that would be proper, the risk of that uncertainty should fall on a deceptive respondent, rather than upon an innocent petitioner.

App. Ex. 7a, pg. 10.

Ultimately, the New York Attorney General's lawsuit produced a total of $1.4 million ($780,000 in refunds to 2,260 New York residents — an average of $345 a piece, more than seventeen times the $20 Churchill Village settlement — plus $650,000 in civil penalties. New York Attorney General Press Release August 5, 2003. (http://www.oag.state.ny.us/press/2003/aug05a_03.html).

of the dishwashers is ruled out by their age." [App. Ex. 7a, pg. 9]. The New York Court also found that GE made false statements to the public that implied that the dishwashers could not be made to operate safely, and that the Consumer Product Safety Commission (the "CPSC") concluded that rewiring the dishwashers was not as safe as replacing the dishwashers. App. Ex. 71, pg. 9, 13.

GE allegedly made repeatedly false and misleading statements to consumers about the possibility of repair.[8]

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8. The New York Court found:

> [A] large number of individual consumers were not eager to buy a new dishwasher at the time of the recall, and inquired whether their machines could be repaired. . . GE had a duty, independent of the recall program, not to foster the program through deceptive means.

App. Ex. 71, pg. 10.

The New York Court determined that GE's conduct was deceptive under any applicable standard. It stated:

> GE's letters and oral statements would be deceptive, even under the reasonable person standard, because the information available at GE's website and in the pre-recorded questions-and-answers, that "if you choose to repair it . . . you do so at your own risk and cost," does not so clearly convey that a safe repair is technically or financially practicable as to overcome the unambiguous implication in the letters, and the express statements of GE's representatives that the dishwashers could not be repaired so as to function safely.

App. Ex. 71, pg. 12.

F. The Illinois Class Certification followed by the California federal settlement

In the California federal proceedings, District Judge Patel set this case for trial beginning June 12, 2001. In the Illinois case, class certification was briefed, with hearing set for April 5, 2001.

However, at the April 5, 2001 Illinois hearing and decision on class certification, GE advised the Illinois court that it had reached agreement in principle to settle the case in the California federal court for the nationwide subclass of those, outside New York, who had bought a new dishwasher, but that the settlement would not be finally documented for a time, and suggested deferring the hearing for the time being. Hearing that, the Illinois court continued the class certification hearing to May 3, 2001, and subsequently further continued, on GE's advice that the process was nearing completion, for status reports on June 12, later July 2, 2001. When no settlement had yet been presented to the Illinois court by late July, the court proceeded to finally hear argument on the long fully-briefed motion for class certification, ruled for the plaintiffs, and certified a nationwide class of all customers who owned the dishwashers. [July 23, 2001 Order of Hon. Paul Biebel, App. Ex. 7c.]

Thereafter, on July 31, 2001, GE and Churchill Village filed a motion in San Francisco federal court for preliminary approval of a class settlement. The settlement and accompanying amended consolidated complaint abandoned the initial Churchill Village/Dorsett plaintiffs and their diversity jurisdiction, and substituted only individual (i.e., excluding multi-unit landlords) dishwasher owners, with a new settlement complaint, asserting, instead, federal question

jurisdiction, based on a newly posited Civil RICO Claim, alleging that GE (a New York corporation) as the defendant, had deceptively conducted the GE Dishwasher recall program (the alleged "enterprise") by a pattern of racketeering activity.

Under the terms of the "settlement," a nation-wide settlement class would be certified for all (other than the N.Y. customers) who had bought a new dishwasher on the initial rebate program who would receive either a one-year service contract covering their purchased new dishwasher or $20, cash. GE agreed to not challenge the Amended Complaint alleging federal question jurisdiction, based on a RICO allegation against it. GE also agreed to a notice to the class that did not reveal what Class action attorneys' fee would be and did not address the existence of the other class actions that were pending against GE. App. Ex. 3a.

G. District Court Review of Jurisdiction and Settlement

Numerous objections to the settlement were raised by class members and by the Attorneys General of Kansas and Missouri, variously challenging the subject matter jurisdiction of the Court, the inadequacy of the settlement and the deficiency of the class notice. Unimpressed by either the stark difference from the New York recovery or the objections, the District Court viewed the objections as mere sour grapes envy by fee- motivated competing attorneys, denied intervention, held that federal jurisdiction could be conferred by the defendants' mere decision not to challenge it, rejected all objections to the settlement, entered preliminary approval[9], and later a Final Judgment approving

9. The objectors sought interlocutory appeal of the preliminary approval, but the appellate court denied leave to appeal. *Churchill Village v. General Electric*, petitions by Beckwith Place and Kamman, No. 01-80207, petition for leave denied, December 20, 2001. App. Ex. 4F.

the settlement by the settling parties' draft order, without any opinion or findings by the court.

H. Appellate Review

The Beckwith objectors appealed the district court's denial of intervention and approval of the settlement, both on jurisdiction and merits. The settling parties contested the objectors' right to appeal at all, urging a narrow reading of this court's decision in *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). The United States Court of Appeals for the Ninth Circuit upheld the Beckwith objectors standing to appeal the district court's approval, then upheld the district court's jurisdiction, on the standard that: "Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction" App. A at 13a. Evaluating the Civil RICO claim, (the sole federal claim under the Amended Settlement Vehicle Complaint) the court reviewed the three actionable provisions under 18 U.S.C. § 1962; agreed that no claim under § 1962(c) could be asserted against a single corporation (for lack of a distinctness between the defendant "person" and the "enterprise" allegedly conducted by it)[10], but concluded that Churchill had pleaded sufficiently non-frivolous claims under §§ 1962(a) and (b), without explaining how a claim could possibly be made that a consumer had been damaged from GE's using or investing the proceeds of its dishwasher recall program (for a § 1962(a) violation) or from GE's maintaining its interest in its own self or its recall program (for a § 1962(b) violation) App. A at 17a. The Ninth Circuit accepted the allegations of damage from those claims on the basis that:

> [W]e cannot say that Churchill's claims under subsections (a) and (b) are so untenable in light

10. *Cedric Kushner Enterprises v. Don King*, 533 U.S. 158 (2001).

> of their conformity to the plain language of the statute and the absence of a distinctiveness requirement as to prohibit federal jurisdiction under the "non-frivolous assertion" standard announced in [*Bollard v. Calif. Province of the Soc'y of Jesus*, 196 F.3d 940 951 (9th Cir. 1999)].

The Ninth Circuit then proceeded to approve the settlement, believing that the district court considered the relevant factors and provided a seasoned response to the settlement objections, and concluded that the district court had not abused its discretion in approving the settlement.

The petitioners herein, state court litigants and certified class representative in the Illinois state litigation, seek a writ of certiorari to review the issue of the court's jurisdiction and authority to address the settlement's merits at all.

REASONS FOR GRANTING THE PETITION

I. The Issue of whether a facially deficient complaint can serve as a vehicle for a class settlement is an important issue of federal jurisdiction.

Only three weeks ago, this court reaffirmed the rule that "a court's subject matter jurisdiction cannot be expanded to account for the parties litigation conduct", and that diversity subject matter jurisdiction lacking at the beginning of a case "may be raised at any time in the same civil action, even initially at the highest appellate instance" even following a trial and jury verdict. *Grupo Dataflux v. Atlas Global Group*, 541 U.S. at __, slip op. at 10, applying *Kontrick v Ryan*, 540 U.S. __, __ (2004) (slip op at 11). Accordingly, the Ninth Circuit's announced standard herein that a facially deficient

diversity claim may nonetheless provide a vehicle for pre-emptive settlement by an also-untenable Civil RICO claim conflicts with this court's recent announcements, and facilitates the gaming of class actions in ways that misuse the federal courts as vehicles to thwart the appropriate processes of state court litigation.

While it is clear that a court without federal jurisdiction lacks the authority to proceed with the case at all, let alone to approve a class action settlement, *See, e.g., Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993) (dismissing case for failure to satisfy jurisdictional amount, even after case had been tried and plaintiffs had won jury verdict), the circuits are split in how facially deficient a complaint can be, yet still serve as a vehicle for promulgating a class action settlement.

The original complaint herein asserted diversity jurisdiction (with supplemental jurisdiction for state law claims) that was invalid on its face. The amended complaint (on which the settlement was based) abandoned diversity and rested federal jurisdiction on a Civil RICO count that was also facially invalid. Rather than viewing this jurisdictional gap as the Court's first order responsibility and *sua sponte* dismiss the action, the court below erroneously viewed the issue as a mere Rule 12(b)(6) problem that was the defendant's choice to challenge, or not; affording the settling parties the impermissible option to confer jurisdiction on the court by consent, in order to effect the settlement.

Allegations cannot be inserted into a complaint solely as an attempt to obtain jurisdiction. *See Lovern v. Edwards*, 190 F.3d 648, 654-55 (4th Cir. 1999); *International Paint Co. v. Grow Group, Inc.*, 648 F. Supp. 729, 731 (S.D.N.Y.

1986) (RICO allegations insufficient to provide subject matter jurisdiction). The plaintiff bears the burden of persuasion to establish that jurisdiction exists. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *Primax v. Sevilla*, 324 F.3d 544 (7th Cir. 2003).

The court needs to give clear direction that federal jurisdiction must first be ascertained, and that specious assertions of federal claims do not suffice to create federal jurisdiction where none actually exists.

II. The Ninth Circuit's standard — "cannot say the claims are *so* untenable in light of their conformity to the plain language of the statute to prohibit federal jurisdiction" — conflicts with the general level of scrutiny for subject matter jurisdiction, and the standards applied in the Seventh and Eighth Circuits, which direct dismissal where, as here, the federal claim is either: (a) immaterial and made solely for the purpose of obtaining jurisdiction; or (b) is wholly insubstantial and frivolous.

In reviewing the approval of class action settlement, the Circuit Courts are generally in agreement that the district court is charged with fiduciary duties to protect the interests of the absent class members,[11] and that responsibility and level of scrutiny is heightened when the federal court is used as a vehicle to competitively pursue a settlement to pre-empt state law claims being pursued in state court. *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 283 (7th Cir. 2002)

11. *See, e.g., Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995); *In re Cendant Corp. Lit.*, 264 F.3d 286, 294 (3d Cir. 2001); and *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002).

(reversing settlement approval and ousting class counsel from a federal court settlement which pre-empted an already certified state class proceeding to trial).

The Ninth Circuit's rule-that alleged jurisdiction must be accepted unless the allegations are *so* untenable as to *prohibit* federal jurisdiction-conflicts with the stronger scrutiny standard, by which most Circuits direct dismissal of complaints based on jurisdictional claims where the federal claim is either: (a) immaterial and made solely for the purpose of obtaining jurisdiction; or (b) is wholly insubstantial and frivolous. *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 449 (5th Cir. 1983); *cf. United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 860 (1975) (affirming the district court's dismissal for lack of subject matter jurisdiction because, although plaintiffs alleged violations of federal securities laws and the Civil Rights Act, plaintiffs' complaint failed to allege claims based on "securities" within the purview of federal securities laws and contained only conclusory allegation under the Civil Rights Act. A federal claim may be insubstantial either "(1) because it is obviously without merit, or (2) because it is clearly foreclosed by previous decisions of the Supreme Court." *Id.* (Citing *Miller v. Stanmore* 636 F.2d 986, 989 (5th Cir. 1981), quoted in *Menard v. Bd. Of Trustees of Loyola University*, 2004 U.S. Dist. LEXIS 4597 (E.D. La. March 22, 2004).

The Ninth Circuit's deference to the settling parties' bald assertion of federal jurisdiction also conflicts with the review standard of the Seventh and Eighth Circuits, which direct dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction where, as here, the plaintiff's claim is "wholly frivolous, [made] for jurisdictional purposes" versus one that may belong in federal court, but is "doomed on the

merits", a distinction with importance in the court's handling of the case. *See Trimble v. Asarco, Inc.*, 232 F.3d 946, 954-55 (8th Cir. 2000) explaining the rule as applied there and by the Seventh Circuit, *LaSalle Nat'l Trust v. ECM Motor Co.*, 76 F.3d 140, 143 (7th Cir. 1996) in applying this court's direction in *Bell v. Hood*, 327 U.S. 678, 682-83):

> The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Finally, this court needs to elucidate a clear rule so that federal jurisdiction cannot be freely manipulated as a vehicle to competitively pre-empt cases which should and are proceeding appropriately in the state courts. Current notoriety over class actions should not be compounded by devices that use the federal courts as a convenient vehicle for settling parties to thwart fundamental concepts of federalism in the pursuit of a Dutch Auction race to the lowest settling party.[12]

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12. The fact that the California $20 settlement is inadequate and unfair is demonstrated by the New York court's full restitution order, by which some 2,260 New York residents each received upwards of $600 restitution on the identical claims and would, absent the settlement herein, likely be expanded to the rest of the owners nationwide in the other cases.

CONCLUSION

Wherefore, petitioners request that this Court grant them a writ of certiorari to review the decisions of the courts below, reverse and dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 16, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-17059
D.C. No.
CV-99-05073-MHP

CHURCHILL VILLAGE, L.L.C., BARBARA DORSETT, and AL DORSETT individually and on behalf of the general public; BARBARA DORSETT; AL DORSETT; SEYMOUR LAZAR; JOAN CHALMERS; JUDITH SAPORTA,

Plaintiffs,

HARRIET SKURMAN; NORMAN HICKMAN; PHYLLIS HICKMAN; CRAIG ROSENFIELD,

Intervenors,

v.

GENERAL ELECTRIC, Individual Consumer Dishwasher Litigation,

Defendant-Appellee,

Appendix A

v.

BECKWITH PLACE LIMITED PARTNERSHIP; SUSAN E. GLATTER KAMMAN, individually and on behalf of others similarly situated,

Plaintiff-Intervenors-Appellants.

No. 02-15354
D.C. No.
CV-99-05073-MHP

CHURCHILL VILLAGE, L.L.C., BARBARA DORSETT, and AL DORSETT individually and on behalf of the general public; BARBARA DORSETT; AL DORSETT; SEYMOUR LAZAR; JOAN CHALMERS; JUDITH SAPORTA,

Plaintiffs-Appellees,

JOSEPH COOPER; NINA KASPRZAK,

Appellants,

and

HARRIET SKURMAN; NORMAN HICKMAN; PHYLLIS HICKMAN; CRAIG ROSENFIELD,

Intervenors,

Appendix A

v.

GENERAL ELECTRIC, INDIVIDUAL CONSUMER DISHWASHER LITIGATION,

Defendant-Appellee,

v.

BECKWITH PLACE LIMITED PARTNERSHIP,

Plaintiff-Intervenor,

and

SUSAN E. GLATTER KAMMAN, individually and on behalf of others similarly situated,

Plaintiff-Intervenor-Appellant.

Appendix A

No. 02-15391
D.C. No.
CV-99-05073-MHP

IN RE: GENERAL ELECTRIC, INDIVIDUAL CONSUMER DISHWASHER LITIGATION,

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CHURCHILL VILLAGE, L.L.C., BARBARA DORSETT; AL DORSETT; SEYMOUR LAZAR; JOAN CHALMERS; JUDITH SAPORTA,

Plaintiffs-Appellees,

HARRIET SKURMAN; NORMAN HICKMAN; PHYLLIS HICKMAN; CRAIG ROSENFIELD,

Intervenors-Appellants,

v.

GENERAL ELECTRIC COMPANY, a New York corporation,

Defendant-Appellee.

Appendix A

No. 02-16838
D.C. No. -
CV-99-05073-MHP

CHURCHILL VILLAGE, L.L.C., BARBARA DORSETT, and AL DORSETT individually and on behalf of the general public,

Plaintiff,

and

JAMES HOYER NEWCOMER & SMILJANICH, P.A.; LEVIN TANNENBAUM WOLFF; CAULEY GELLER BOWMAN & COATES, LLP,

Appellants,

v.

GENERAL ELECTRIC, a New York corporation,

Defendant-Appellee.

Appendix A

No. 02-16906
D.C. No.
CV-99-05073-MHP

OPINION

CHURCHILL VILLAGE, L.L.C., BARBARA DORSETT, and AL DORSETT individually and on behalf of the general public; BARBARA DORSETT; AL DORSETT; SEYMOUR LAZAR; JOAN CHALMERS; JUDITH SAPORTA,

Plaintiffs,

and

JAMES HOYER NEWCOMER & SMILJANICH, P.A.; LEVIN TANNENBAUM WOLFF; CAULEY GELLER BOWMAN & COATES, LLP,

Claimants-Appellees,

v.

GENERAL ELECTRIC, a New York corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Appendix A

Argued and Submitted
September 8, 2003—San Francisco, California

Filed March 16, 2004

Before: Mary M. Schroeder, Chief Judge, Diarmuid F. O'Scannlain, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge O'Scannlain

OPINION

O'SCANNLAIN, Circuit Judge.

We must decide various challenges to a class-action settlement of these suits against the manufacturer of consumer dishwashers.

I

A

Between 1983 and 1989, General Electric ("GE") manufactured and sold approximately three million GE- and Hotpoint-brand dishwashers equipped with a sliding "energy saver" switch. Although some were sold to individual consumers, the dishwashers were considered "low end" products and were primarily marketed to contractors, builders, and owners of commercial or rental properties. The switch, which allows a user to select either a heated drying cycle or drip drying, deteriorates over time and may melt or ignite.

Appendix A

Reports of fires caused by the allegedly defective switch eventually prompted an investigation by the Consumer Product Safety Commission ("CPSC"). Although the investigation found that no consumers had been physically injured, it determined that approximately 50 fires could be attributed to the switch, three of which damaged property other than the dishwasher itself. Under the terms of a formal settlement agreement between GE and the CPSC, GE announced a "recall" of the dishwashers in October 1999. GE advised consumers to stop using the dishwashers immediately, and offered a choice between a $75-125 cash rebate toward the purchase of a GE-brand dishwasher or a $25 cash refund toward the purchase of a non-GE-brand dishwasher, along with a free one-year service agreement with GE. GE also agreed to replace dishwashers still under extended service agreements. The GE-CSPC agreement also permitted GE to reach a separate agreement with owners and operators of commercial and residential properties that could include discounted bulk pricing and instructions to repair the switch by rewiring. Dissatisfied with the rebate program, some consumers turned to the courts.

B

The first of the two underlying actions consolidated in this appeal was filed in November 1999. Churchill Village, L.L.C. ("Churchill"), an Oregon corporation and owner of an apartment building in Eugene, Oregon, sued GE both individually and on behalf of the general public in the Northern District of California, asserting claims under California's unfair competition and false advertising laws and seeking injunctive relief and restitution. Churchill

asserted federal jurisdiction against GE (a New York corporation headquartered in Connecticut) based on diversity of citizenship, contending that injunctive relief as measured by the cost to the defendant exceeded the $75,000 amount-in-controversy requirement. *See* 28 U.S.C. § 1332. Jurisdiction over the state-law claims was asserted on the principles of supplemental jurisdiction in 28 U.S.C. § 1367. The complaint was later amended to add two individual plaintiffs, Al and Barbara Dorsett, citizens of California. Churchill and the Dorsetts then sought a preliminary injunction, which the district court denied on May 10, 2000. *Churchill Village, L.L.C. v. Gen. Elec. Co.*, 169 F.Supp.2d 1119 (N.D.Cal.2000).

Also in May 2000, Seymour Lazar, a California citizen, sued GE in the Northern District of California on behalf of himself, the general public, and a putative class of consumer owners. *Lazar v. General Electric Co.*, No. C 00-1621. In addition to violations of California's unfair competition and false advertising laws, the complaint alleged counts of common-law fraud and violations of federal law. Federal jurisdiction was thus asserted on the existence of a federal question under 28 U.S.C. § 1331, with supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367.

Contemporaneously with the *Churchill* and *Lazar* suits in California, Beckwith Place Limited Partnership ("Beckwith"), a Michigan property owner, sued GE in Illinois state court in December 1999, seeking to represent a nationwide class of consumer-owners. Other consumers filed class actions in Connecticut state court in March 2000.

Still other consumers sued GE in both state and federal court in Florida in December 1999 and February 2000 respectively. The Florida plaintiffs were represented by James, Hoyer, Newcomer & Smiljanich, P.A.; Levin, Tannenbaum, Wolff; and Cauley, Geller, Bowman & Coates, L.L.P. (collectively "Florida Counsel"), who allege entitlement to attorneys' fees in this litigation.

Finally, the New York Attorney General brought suit in New York state court in March 2000, challenging GE's initial dishwasher recall as deceptive. The action resulted in an award of restitution for New York consumers who purchased new dishwashers in reliance on GE's statements that repair of the recalled dishwashers was impracticable. New York consumers were therefore excluded from the nationwide class approved by the district court.

C

Following pre-trial motions and discovery, the Churchill plaintiffs reached a settlement agreement with GE. Churchill agreed to file (and did so on August 1, 2001) a consolidated amended complaint seeking certification of a class under Fed.R.Civ.P. 23(b)(3).[1] Under the terms of the settlement agreement, GE agreed to provide each class member with either a $20 cash rebate or a one-year service contract.

After Churchill moved the district court for preliminary approval of the proposed settlement, Beckwith—here

1. Asserting federal question and supplemental jurisdiction, the consolidated complaint alleged violations of California's unfair competition and false advertising laws; common-law fraud; and violations of federal law.

representing the two sets of plaintiffs pursuing class actions against GE in state court in Illinois and Connecticut— moved to intervene to object. The Beckwith objectors were permitted to present their objections to the proposed settlement in writing and participated in the preliminary approval and fairness hearings. The district court denied the intervention motion and preliminarily approved the proposed settlement.

On January 22, 2002, the district court issued a final order approving the settlement, dismissing with prejudice all claims by members of the settlement class, awarding fees to Churchill's counsel, and denying fees to Florida Counsel. The Beckwith objectors now appeal the district court's approval of the settlement and Florida Counsel appeal the denial of attorneys' fees, claiming that they were responsible for catalyzing Churchill's successful result. Recognizing that Florida Counsel's claim shared a common progenitor with Churchill's settlement, we consolidated these appeals.

II

As a threshold matter, Churchill disputes whether the Beckwith objectors have any right to appeal. Churchill points out that the district court certified the settlement class under Fed.R.Civ.P. 23(b)(3), thereby permitting objecting class members like Beckwith to exclude themselves from the settlement. Because the objectors can opt out, Churchill contends that they suffer no injury and thus lack standing to appeal.

But the issue is not precisely one of standing. As the Supreme Court has noted, neither Article III nor prudential

standing is implicated by the efforts of non-intervening objectors to appeal class-action settlements. *See Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). Instead, the inquiry is best characterized as concerning the definition of a "party" for purposes of appeal. *Id.* And the *Devlin* Court made clear that objectors should be considered parties, holding that "non-named class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Id.* at 14.

Churchill urges that we read *Devlin* narrowly. There, the Court relied on the fact that Devlin was unable to opt out of the Rule 23(b)(1) class. Here, by contrast, the Beckwith objectors may exclude themselves from the settlement and thus preserve their right to seek relief from GE. Yet this ostensible independence is belied by an essential impracticability. Because each objector's claim is too small to justify individual litigation, a class action is the only feasible means of obtaining relief. By terminating all class actions relating to the dishwasher recall, the settlement will effectively bind the objectors. They therefore occupy precisely the status the *Devlin* Court sought to protect. *See id.* at 10 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing.").

We are satisfied that *Devlin* applies here sufficiently to permit the Beckwith objectors to challenge the settlement

approved by the district court. Such a reading of *Devlin* is consistent, moreover, with our longstanding pre-*Devlin* practice of permitting objecting class members to appeal settlements. *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir.1977) (allowing class members who had not opted out to appeal settlement); *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir.1981) (noting that unnamed class member who was represented by counsel at settlement conference "could have challenged it by direct appeal"); *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1309 (9th Cir.1982) ("[A] class member may appeal from an order approving a settlement to which the member objects [.]"); *see also* 5 *Moore's Federal Practice* § 23.86[2] (3d ed.1997) (arguing for a broad reading of *Devlin*).

Because we conclude that Beckwith may appeal the approval of the settlement, we now turn to the merits.

III

Beckwith first contends that the district court lacked subject-matter jurisdiction. Churchill counters that either federal question (28 U.S.C. § 1331) or diversity (28 U.S.C. § 1332) jurisdiction prevailed.

A

Was there federal question jurisdiction? Both the May 2000 *Lazar* complaint and the consolidated complaint alleged that GE's operation of the dishwasher recall program violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Both complaints named

GE as the RICO "person" under 18 U.S.C. § 1961(3) and the recall program as the RICO "enterprise" under § 1961(4). Both alleged that GE committed numerous violations of federal mail and wire fraud statutes as it engaged in a pattern of racketeering activity relating to the recall program. In telephone calls and correspondence, according to the complaints, GE misled the CPSC about the defective nature of the dishwashers. The complaints also alleged that GE deceived affected customers by downplaying the seriousness of the dishwashers' defects; attempting to reduce GE's costs to remedy the defects; and 3295 fraudulently inducing customers to purchase other GE products.

More specifically, the complaints alleged that GE violated 18 U.S.C. § 1962(a) by using income derived from its pattern of racketeering activity to establish or operate the recall program.[2] The complaints further alleged that GE violated § 1962(b) when it used its pattern of racketeering activity to acquire or to maintain an interest in or control of the recall program; and violated § 1962(c) by conducting

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2. Subsection 1962(a) reads in relevant part: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . ."

The *Lazar* complaint specifically cites § 1962(a); the consolidated complaint copies the language of this allegation under subsection (a) but erroneously cites subsection (c).

the recall program through a pattern of racketeering activity.[3] The complaints added a conspiracy count under § 1962(d).[4] Churchill now contends that these recitals are enough to confer federal question jurisdiction under 28 U.S.C. § 1331.[5]

Beckwith's succinct response is that the RICO claims are wholly without merit and incapable of supporting federal

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3. Subsection 1962(b) reads in full: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Subsection (c) reads in full: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

4. Subsection (d) reads in full: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

5. The consolidated complaint also alleged that GE violated the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, by breaching the dishwashers' implied warranties of fitness and merchantability. But these claims do not appear viable in light of the requirement of 100 named plaintiffs to maintain a federal class action based on the Act. *See* 15 U.S.C. § 2310(d)(3)(C) (no cognizable claim "if the action is brought as a class action, and the number of named plaintiffs is less than one hundred"). In this appeal, Churchill does not contend that federal jurisdiction over the settlement can be grounded on the Act.

jurisdiction. Pointing to our decision in *Rae v. Union Bank*, 725 F.2d 478 (9th Cir.1984), they argue that it is well-established that § 1962(c) requires that the "person" and "enterprise" be distinct, and that GE and the recall program are here insufficiently distinct to trigger RICO liability. Beckwith contends that the RICO claims are "terminally flawed," and thus the district court should not have entertained the action.

B

Let us remember that the standard for establishing federal jurisdiction is even less stringent than that required to state a claim under Fed.R.Civ.P. 12(b)(6). As we have explained, "Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits." *Bollard v. Calif. Province of the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir.1999); *see also Cement Masons Health and Welfare Trust Fund for N. Calif. v. Stone*, 197 F.3d 1003, 1008 (9th Cir.1999).

Although the claim under § 1962(c) indeed appears entirely foreclosed by our decision in *Rae*, we need not evaluate the merits or probability of success of that claim, for Churchill has pleaded sufficiently non-frivolous claims under § 1962(a) and (b). We have not required that the RICO "person" and "enterprise" be distinct in actions under these subsections. *See Wilcox v. First Interstate Bank of Ore., N.A.*, 815 F.2d 522, 529 (9th Cir.1987); *see also Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir.1986) ("[W]here a corporation engages in racketeering activities and is the direct or indirect beneficiary

of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a)."). Churchill sufficiently alleged that income derived indirectly from acts of mail and wire fraud forming a pattern of racketeering activity was used in the establishment and operation of the injurious recall "enterprise," as required by § 1962(a). *See Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co.*, 981 F.2d 429, 437 (9th Cir.1992) (plaintiff under § 1962(a) "must allege facts tending to show that he or she was injured by the use or investment of racketeering income"). And the complaints also alleged that GE maintained control of the recall program through acts of mail and wire fraud comprising a pattern of racketeering, as required by § 1962(b). *See Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1111 (9th Cir.2003) (explaining that, in order to survive a motion to dismiss for failure to state a claim, the plaintiff must allege an injury stemming from defendant's control over a RICO enterprise).

We express no opinion regarding the likelihood of success on these claims, noting only that our cases have permitted RICO plaintiffs to amend inadequately pleaded claims to avoid dismissal under the more stringent standard mandated by Fed.R.Civ.P. 12(b)(6). *See Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th Cir.1986). But we cannot say that Churchill's claims under subsections (a) and (b) are so untenable in light of their conformity to the plain language of the statute and the absence of a distinctiveness requirement as to prohibit federal jurisdiction under the "non- frivolous assertion" standard announced in *Bollard*. The district court therefore properly exercised jurisdiction over the settlement.

C

Because we are satisfied that the district court possessed federal question jurisdiction, we need not reach the question of whether it had diversity jurisdiction as well.

IV

Beckwith next contends that the notice of settlement was defective because it failed adequately to inform class members about the status of other litigation arising from the dishwasher recall.[6]

Fed.R.Civ.P. 23(c)(2) prescribes the "best notice practicable under the circumstances." Notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Mendoza v. Tucson Sch. Dist. No. 1,* 623 F.2d 1338, 1352 (9th Cir.1980). The notice approved by the district court met this standard. Apart from informing class members of the settlement's terms, the notice also listed the names, case numbers, and courts of pending actions in Illinois, Florida, New York, and Connecticut. The district court ordered that this information be included in the notice in response to concerns expressed

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6. Beckwith also condemns the notice's reticence on the amount of attorneys' fees to be awarded to counsel for Churchill. The notice stated that attorneys' fees had not yet been awarded and that they would be paid by GE alone. But because the notice was disseminated on September 24, 2001, before fees were required to be requested, class members were accurately apprised of the current status of the attorneys' fees award.

by the Beckwith objectors at the preliminary approval hearing. Under the circumstances, we are satisfied that the notice approved by the district court provided "absent class members . . . with the opportunity to opt-out and individually pursue any state law remedies that might provide a better opportunity for recovery." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir.1998).

V

Finally, Beckwith challenges the fairness and adequacy of the settlement approved by the district court. We are required to determine whether the district court abused its discretion in balancing the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *See Hanlon,* 150 F.3d at 1026.[7] In addition, although "strong judicial policy . . . favors settlements," *see Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir.1992), the settlement may not be the product of collusion among the negotiating parties. *Id.* at 1290.

In this case, Churchill presented the district court with a memorandum of points and authorities that referred to the

7. Because the settlement evaluation factors are non-exclusive, discussion of those factors not relevant to this case has been omitted. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993).

correct standard; the district court examined the memorandum and considered the relevant factors in concluding that the settlement was fair, adequate, and reasonable. Although Beckwith faults the district court for not producing written findings of fact, we have not required a formal written response where the district court "provide[s] a reasoned response elsewhere in the record." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir.1995). Here, the record reveals that the district court appropriately considered the relevant factors, which we now analyze in turn:

The strength of the plaintiffs' case. The settlement was approved in September 2001, almost two years after litigation commenced. In rejecting Churchill's request for a preliminary injunction, the district court concluded that the plaintiffs were unlikely to succeed on the merits. *See Churchill,* 169 F.Supp.2d at 1133. Moreover, GE's three summary judgment motions were pending before the court. The court also considered the merits of the case in the preliminary approval and fairness hearings, at which the Beckwith objectors were permitted to present their objections to the proposed settlement; the objectors were also allowed to offer written objections. In sum, the district court more than adequately evaluated the merits and likelihood of success of the settling plaintiffs' case.

The risk, expense, complexity, and likely duration of further litigation. In addition to evaluating the strength of the plaintiffs' case, the district court knew that GE believed it had a strong case on the merits, was aware that Churchill's RICO claims were vigorously disputed, and knew that an

appeal by the losing party was likely. We therefore conclude that the district court appropriately weighed the risk, expense, complexity, and likelihood of further litigation.

The amount of the settlement. The district court exhaustively considered the amount of the settlement at two separate hearings. In addition to reviewing the details of the earlier recall program, the court was fully aware of the more generous restitution formula used in New York—in large measure due to the participation of the Beckwith objectors in the settlement hearings. However, because the recalled dishwashers had depreciated in value through years of use and the class members had already received a rebate from GE as part of the recall program, the Churchill plaintiffs themselves conceded that recovering more than the settlement consideration at trial would be difficult. The district court's assessment of the amount of the settlement was grounded on a thorough consideration of the relevant data, and we conclude that the evidence amply justified the court's determination that the settlement amount was fair.

The experience and views of counsel. The district court was well- acquainted with the views of counsel for Churchill, Beckwith, and GE. In addition to the preliminary approval and fairness hearings, the district court considered Churchill's memorandum in support of settlement approval and the Beckwith objectors' two motions to intervene. At the fairness hearing, the court also noted and queried Churchill about correspondence from the Missouri and Kansas attorneys general that raised questions about the settlement's adequacy. In sum, the record shows that the district court approved the settlement with a thorough consideration of not only the

views of counsel for the settling plaintiffs and GE, but also the objections of opposing counsel.

The reaction of class members to the proposed settlement. The district court was informed that only 45 of the approximately 90,000 notified class members objected to the settlement. And in considering the Beckwith objectors' motions to intervene and arguments against the settlement at the two hearings, the court was obviously made aware of an array of objections to the settlement. Finally, because the class was certified under Fed.R.Civ.P. 23(b)(3), the district court also reviewed the ultimate list of 500 opt-outs prior to issuing the order finalizing the settlement. The record amply demonstrates that the district court weighed the reactions of members of the proposed settlement class.

The possibility of collusion. Beckwith contends that the settlement was negotiated in bad faith, specifically claiming that the RICO claims were pleaded in an effort to contrive federal jurisdiction to permit a settlement to go forward. The objectors raised this same allegation of collusion before the district court, which rejected the suggestion of collusion at the settlement approval hearing. Beckwith presents no real evidence of collusion, and we note that the ostensibly collusive RICO claims were first aired in the *Lazar* complaint in May 2000—a year before settlement negotiations began. We therefore conclude that the district court's finding was not clearly erroneous. *See In re Pac. Enters.*, 47 F.3d at 377 (district court findings of fact reviewed for clear error).

Because the record reveals that the district court considered the relevant factors and provided a reasoned

response to settlement objections, we conclude that the district court did not abuse its discretion in approving the settlement.

VI

Florida Counsel contend in their appeal that they were improperly denied attorneys' fees.

A

In between the filing of *Churchill* in November 1999 and *Lazar* in May 2000, Florida Counsel filed two lawsuits of their own. The first, filed in Florida state court on December 3, 1999, and captioned *Walley v. General Electric Company,* was a putative nationwide class action grounded in state-law claims predicated on strict liability and breach of implied warrant of merchantability torts. The second, filed in the Middle District of Florida in February 2000, and captioned *Schoenfisch v. General Electric Company,* also was a putative nationwide class action, and alleged claims grounded upon fraud and violations of RICO, the Consumer Products Safety Act and its associated regulations, 15 U.S.C. § 1064 & 16 C.F.R. §§ 1115.10 *et seq.,* Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501.201 *et seq.,* and Florida's false advertising statute, Fla. Stat. ch. 817.41.

Neither case met with much success. On May 12, 2000, *Walley* was dismissed on grounds that none of the named plaintiffs had yet suffered damages on account of the allegedly defective switch and that the complaint therefore had failed adequately to ground a tort cause of action.

Appendix A

On July 14, 2000, U.S. District Judge Steven Merryday granted GE's motions to dismiss *Schoenfisch* for failure to conform to Fed.R.Civ.P. 9(b) and to stay discovery until a viable claim could be stated, and gave Florida Counsel 14 days within which to file an amended complaint. Although Florida Counsel timely amended their *Schoenfisch* complaint, discovery in the case remained stayed[8] and GE's motion to dismiss the amended complaint was pending when GE entered into a preliminary agreement to settle Churchill's action on April 4, 2001. As a result of that movement towards a final national settlement, GE's motion to dismiss the amended *Schoenfisch* complaint was never adjudicated, and no class was ever certified through the federal litigation filed in Florida.

Shortly after the nationwide settlement was approved, California Counsel filed an application for fees and costs both on their own behalf (pursuant to contractual rights provided them in the settlement agreement) and on behalf of Florida Counsel (pursuant to Cal.Civ.Proc.Code § 1021.5, on the theory that their involvement in the litigation had catalyzed the successful settlement[9]). GE vigorously

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8. Pursuant to Judge Merryday's order, Florida Counsel continued to be provided with copies of all documents given to the other parties litigating similar cases.

9. Indeed, the record indicates that Florida Counsel were responsible for developing the RICO claims which grounded federal jurisdiction over the settlement, having first filed such claims in their *Schoenfisch* complaint and subsequently shared them with California Counsel—who appear essentially to have pasted them into both the

(Cont'd)

contested the fees requested on behalf of Florida Counsel, and on March 25, 2002, Chief Judge Patel held a fee hearing at which GE, California Counsel, and Florida Counsel entered appearances. On August 8, 2002, Chief Judge Patel issued a final fee order awarding costs and fees to California Counsel and denying Florida Counsel's application for fees.

B

Before we can turn to the merits of Florida Counsel's claim to fees under § 1021.5, we must assure ourselves that they have standing to assert a claim under that provision.[10]

(Cont'd)
Lazar and consolidated complaints with, for the most part, only minor stylistic changes (*e.g.*, adding an occasional comma, deleting quotation marks, or changing a few random words) and occasional formatting alterations (*e.g.*, renumbering relevant cross-references, inserting § symbols, and slightly reordering the claim's component paragraphs).

10. As the Supreme Court has explained:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

(Cont'd)

In relevant part, and subject to a variety of subsidiary conditions, § 1021.5 allows courts to "award attorney's fees *to a successful party* against one or more opposing parties in any action which has resulted in the enforcement of a significant right affecting the public interest." Cal.Civ.Proc.Code § 1021.5 (emphasis added). The insurmountable hurdle precluding Florida Counsel's invocation of § 1021.5 is that they neither seek fees on behalf of "a successful party" in the settlement litigation, nor were they themselves "part[ies]" to the litigation within the meaning of § 1021.5.[11] Instead, they bring this suit in their own name and on their own behalf.

California's Supreme Court has long observed that § 1021.5 vests no legal interest in attorneys themselves:

(Cont'd)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations, quotations, and alterations omitted).

Whether a party has standing to bring suit is a question of law reviewed *de novo. See, e.g., Fair Housing of Marin v. Combs,* 285 F.3d 899, 902 (9th Cir.2002); *Natural Resources Defense Council v. Southwest Marine,* 236 F.3d 985, 994 (9th Cir.2000).

11. Indeed, it is unclear whether Florida Counsel even represented a party to the settlement. Although the record indicates that Florida Counsel referred two clients to California Counsel for use as class representatives in the consolidated *Churchill* complaint, we think it far from certain that such a referral is tantamount to representation of those individuals in the relevant proceedings; such an assertion strikes us as akin to that of a doctor who, having diagnosed and preliminarily treated a patient, sends him to a surgeon across town and later seeks credit for the successful operation that surgeon eventually performed.

"[M]onies awarded . . . inure not to the benefit of the attorneys involved but the [clients] by which they are employed." *Press v. Lucky Stores, Inc.*, 34 Cal.3d 311, 322 n. 12 (1983) (*quoting Serrano v. Priest*, 20 Cal.3d 25, 49 (1977)).[12] In the same vein, it is well settled that attorneys

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12. *Flannery v. Prentice*, 26 Cal.4th 572, 110 Cal.Rptr.2d 809, 28 P.3d 860 (Cal.2001), is not to the contrary. Despite some language suggesting that an analogous state-law attorneys' fees statute might confer standing on an attorney in order to recover fees, that case arose in the context of, and was limited to, an attorney-client dispute over fee ownership. The California Supreme Court carefully emphasized that it addressed only "the narrow question . . . whether a party may receive or keep the proceeds of a fee award when she has neither agreed to pay her attorneys nor obtained from them a waiver of payment," *id.* at 580-81, and ultimately explained:

> [T]he [Supreme Court's] analysis of 42[U.S.C. §] 1988 is not incompatible with . . . ruling that [the lawyers in this case] are entitled to the proceeds of the fee award that plaintiff concedes she authorized [them] to seek. As the Ninth Circuit Court of Appeals explained in *Virani, Evans* stands for the proposition that, under 42 [U.S.C. §] 1988, only a plaintiff has power to demand a defendant pay the fees of the plaintiff's attorney, and "the defendant's liability will only arise if that power is exercised." But once the client's right to demand attorney fees is exercised, the attorney's right to receive them "comes into being." Accordingly, and as pertinent for our purposes, "the plaintiff has no power to confer the fee upon himself."

Id. at 582 (citations omitted) (emphases added). Thus, rather than undermine our conclusion that § 1021.5 confers no legally enforceable interest on the attorneys themselves, *Flannery* clearly

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lack standing to seek fees under its federal analogue, 42 U.S.C. § 1988. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 730-31 & n. 19 (1986); *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990); *United States ex rel. Virani v. Jerry M. Lewis Truck Parts and Equipment, Inc.*, 89 F.3d 574, 577 (9th Cir.1996); *Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir.1986). California courts have long considered such precedents to be persuasive authority. *Tipton-Whittingham v. City of L.A.*, 316 F.3d 1058, 1062-63 (9th Cir.2003) (noting "what appears to be a tradition of California courts to construe the attorneys' fees provision of California Code of Civil Procedure § 1021.5 in accord with analogous federal statutory provisions"); *see also Maria P. v. Riles*, 43 Cal.3d 1281, 1290, (Cal.1987) ("Since both this court and the Legislature have relied on federal cases in framing the private attorney general theory [encapsulated in § 1021.5], we regard the federal precedent in this area as persuasive.").

We see no reason to depart from the settled understandings of both California and federal law, and therefore conclude that Florida Counsel lack standing to pursue an award of fees.[13]

(Cont'd)
recognized that such an interest can arise only *after* the client authorizes his or her attorneys to seek fees *on his or her behalf.* To reiterate, it is not even clear that Florida Counsel represented a client in the *Churchill* litigation.

13. Consequently, we need not address GE's conditional cross-appeal with respect to this issue.

Appendix A

VII

For the foregoing reasons, the judgment of the district court is AFFIRMED in its entirety.

APPENDIX B — FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 22, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-99-5073 MHP
Case No. C-00-1621 MHP
(RELATED CASES)

IN RE GENERAL ELECTRIC INDIVIDUAL CONSUMER DISHWASHER LITIGATION

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Court for hearing pursuant to the Order of this Court, dated September 14, 2001, on the application of the parties for approval of the settlement set forth in the Class Settlement Agreement and Release, dated as of April 4, 2001 ("Class Settlement Agreement"). Due and adequate Notice having been given to the Settlement Class as required in said Order, and the Court having considered all papers filed and proceedings herein and otherwise being fully informed in the premises and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This judgment incorporates by reference the definitions in the Class Settlement Agreement and all terms used herein shall have the same meanings set forth in the Class Settlement Agreement.

2. This Court has jurisdiction over the subject matter of the Litigation and over all parties to the Litigation, including the Settlement Class Members.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, on September 14, 2001 this Court certified a Settlement Class of all Individual Consumers (except for those Individual Consumers resident in the State of New York) who, pursuant to the Recall Program, purchased a new dishwasher on or before December 31, 2000 and to whom GE issued a rebate check (other than those who timely and validly requested exclusion from the Settlement Class).

4. With respect to the Settlement Class, the Court finds and concludes that: (a) the Persons included within the Settlement Class are so numerous that joinder of all Settlement Class Members in the action is impracticable; (b) there are questions of law and fact common to the class that predominate over any individual question; (c) the claims of the Class Representatives are typical of the claims of the Settlement Class Members; (d) the Class Representatives and their counsel have fairly and adequately represented and protected the interests of the Settlement Class Members; and (d) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering (i) the interests of the Settlement Class Members in individually controlling the prosecution of the separate actions, (ii) the extent and nature of any litigation concerning the controversy already commenced by Settlement Class Members, (iii) desirability and undesirability of concentrating the litigation of these claims in a particular forum, and (iv) the difficulties likely to be encountered in the management of the class action.

Appendix B

5. Pursuant to Federal Rule of Civil Procedure 23, the Court hereby approves the settlement set forth in the Class Settlement Agreement and finds that, in all respects, said settlement is fair, reasonable, and adequate to the Settlement Class.

6. Except as to those Persons who have validly and timely requested exclusion from the Settlement Class (such Persons are identified in Exhibit A attached hereto), the Litigation and all claims contained therein, as well as all the Released Claims, are dismissed with prejudice as against the Released Persons. The parties are to bear their own costs, except as otherwise provided in the Class Settlement Agreement.

7. The Class Representatives and each of the Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims as against the Released Persons.

8. The Class Representatives and each of the Settlement Class Members are hereby forever barred and enjoined from prosecuting the Released Claims against the Released Persons.

9. The Notice given to the Persons included within the Settlement Class, by providing individual notice to all Persons included within the Settlement Class who could be identified through reasonable effort, was the best notice practicable under the circumstances. Said notice provided the best notice practicable under the circumstances of these

proceedings and of the matters set forth therein, including the proposed settlement set forth in the Class Settlement Agreement, to all Persons entitled to such notice, and said notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the requirements of due process.

10. Any fee petition filed in this action, or any order entered, regarding any attorney's fees application, shall in no way disturb or affect this Final Judgment and shall be considered separate from this Final Judgment.

11. Neither the Class Settlement Agreement nor the settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Class Settlement Agreement or the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of GE, or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of GE in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. GE may file the Class Settlement Agreement and/or the Judgment from this action in any other action that may be brought against it in order to support a defense or counterclaim based on principles of *res judicata,* collateral estoppel, release, good faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

12. If any legal or administrative proceeding, action, or lawsuit asserting claims or seeking remedies concerning, relating to, or arising out of the Released Claims is

commenced or maintained by (i) any federal (except CPSC), state (except the State of New York), or local government authority other than in the capacity as an owner, purchaser, lessor, or user of a Subject Dishwasher (*e.g.*, in a *parens patriae* function), or (ii) any other Person authorized by statute to act as a private attorney general and acting in such capacity, GE shall have the option, in its sole discretion, to immediately suspend providing the consideration as set forth in section 6 of the Class Settlement Agreement to Settlement Class Members subject to the proceeding, action, or lawsuit pending its outcome. Should GE choose to exercise such option, it shall give Class Counsel written notice of such intent no later than 10 days prior to the suspension of such consideration. Class Counsel may file an objection with the Court concerning GE's exercise of such option, in which case it shall be Class Counsel's burden to demonstrate that such exercise is unfair and unreasonable to the affected Settlement Class Members pursuant to Federal Rule of Civil Procedure 23(e).

13. Without affecting the finality of this Judgment in any way, the Court hereby retains continuing jurisdiction over (a) implementation of this settlement; (b) hearing and determining applications for attorneys' fees, costs, interest, and expenses in the Litigation; and (c) all parties thereto for the purpose of construing, enforcing, and administering the Class Settlement Agreement.

14. In the event that the settlement does not become effective in accordance with the terms of the Class Settlement Agreement, then this Judgment shall be rendered null and void to the extent provided by and accordance with the Class Settlement Agreement and shall be vacated.

Appendix B

IT IS SO ORDERED

Dated: 1/22/02

s/ Marilyn Hall Patel
The Hon. Marilyn Hall Patel
United States District Court Judge